

Assembly Bill No. 2442

Passed the Assembly August 27, 2014

Chief Clerk of the Assembly

Passed the Senate August 25, 2014

Secretary of the Senate

This bill was received by the Governor this _____ day
of _____, 2014, at _____ o'clock ____M.

Private Secretary of the Governor

CHAPTER _____

An act to amend Section 13304 of the Water Code, relating to water quality.

LEGISLATIVE COUNSEL'S DIGEST

AB 2442, Gordon. Porter-Cologne Water Quality Control Act: remedial action: liability.

Existing law, the Porter-Cologne Water Quality Control Act, requires a person who discharges waste into the waters of the state in violation of waste discharge requirements or other order or prohibition issued by a California regional water quality control board or the State Water Resources Control Board to clean up the waste or to abate the effects of the waste. Existing law authorizes the regional board to expend available moneys to perform any cleanup, abatement, or remedial work required under those circumstances.

This bill would prohibit the state board, regional board, or an employee of the state board or regional board from being held liable in a civil proceeding for trespass or any other act that is necessary to carry out an investigation, cleanup, abatement, or other remedial work. This bill would also prohibit the state board, regional board, or any authorized person from incurring any obligation to undertake additional investigation, cleanup, abatement, or other remedial work solely because of its decision to undertake that work. The bill would require that these provisions apply to a claim against a public entity presented on or after January 1, 2015, or, if no claim is presented, to a cause of action in a civil complaint or a writ petition filed on or after January 1, 2015. The bill would also make various technical, nonsubstantive changes.

The people of the State of California do enact as follows:

SECTION 1. Section 13304 of the Water Code is amended to read:

13304. (a) A person who has discharged or discharges waste into the waters of this state in violation of any waste discharge

requirement or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall, upon order of the regional board, clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts. A cleanup and abatement order issued by the state board or a regional board may require the provision of, or payment for, uninterrupted replacement water service, which may include wellhead treatment, to each affected public water supplier or private well owner. Upon failure of a person to comply with the cleanup or abatement order, the Attorney General, at the request of the board, shall petition the superior court for that county for the issuance of an injunction requiring the person to comply with the order. In the suit, the court shall have jurisdiction to grant a prohibitory or mandatory injunction, either preliminary or permanent, as the facts may warrant.

(b) (1) The regional board may expend available moneys to perform any cleanup, abatement, or remedial work required under the circumstances set forth in subdivision (a), including, but not limited to, supervision of cleanup and abatement activities that, in its judgment, is required by the magnitude of the endeavor or the urgency for prompt action to prevent substantial pollution, nuisance, or injury to any waters of the state. The action may be taken in default of, or in addition to, remedial work by the waste discharger or other persons, and regardless of whether injunctive relief is being sought.

(2) The regional board may perform the work itself, or with the cooperation of any other governmental agency, and may use rented tools or equipment, either with operators furnished or unoperated. Notwithstanding any other provisions of law, the regional board may enter into oral contracts for the work, and the contracts, whether written or oral, may include provisions for equipment rental and in addition the furnishing of labor and materials necessary to accomplish the work. The contracts shall not be subject to approval by the Department of General Services.

(3) The regional board shall be permitted reasonable access to the affected property as necessary to perform any cleanup, abatement, or other remedial work. The access shall be obtained with the consent of the owner or possessor of the property or, if the consent is withheld, with a warrant duly issued pursuant to the procedure described in Title 13 (commencing with Section 1822.50) of Part 3 of the Code of Civil Procedure. However, in the event of an emergency affecting public health or safety, the regional board may enter the property without consent or the issuance of a warrant.

(4) The regional board may contract with a water agency to perform, under the direction of the regional board, investigations of existing or threatened groundwater pollution or nuisance. The agency's cost of performing the contracted services shall be reimbursed by the regional board from the first available funds obtained from cost recovery actions for the specific site. The authority of a regional board to contract with a water agency is limited to a water agency that draws groundwater from the affected aquifer, a metropolitan water district, or a local public agency responsible for water supply or water quality in a groundwater basin.

(5) (A) If the state board or regional board, either directly or by contracting for services, undertakes to perform an investigation, cleanup, abatement, or other remedial work, both of the following shall apply:

(i) The state board, regional board, or an employee of the state board or regional board shall not be held liable in a civil proceeding for trespass or any other act that is necessary to carry out an investigation, cleanup, abatement, or other remedial work.

(ii) The state board, regional board, or any authorized person shall not incur any obligation to undertake additional investigation, cleanup, abatement, or other remedial work, solely as a result of having conducted the work.

(B) The following applies for purposes of this paragraph:

(i) "Authorized person" means any of the following:

(I) An employee or independent contractor of the state board or regional board.

(II) A person from whom investigation, cleanup, abatement, or other remedial work is contracted by the state board or regional board.

(III) An employee or independent contractor of a person described in subclause (I) or (II).

(ii) “Investigation, cleanup, abatement, or other remedial work” includes investigation, cleanup, abatement, or other remedial work performed pursuant to this section or Section 13267, or corrective action performed pursuant to Section 25296.10 or 25299.36 of the Health and Safety Code.

(C) It is not the intent of this paragraph to do any of the following:

(i) Impair any cause of action by the state board or regional board against any person, including, but not limited to, a cause of action for breach of contract or indemnity.

(ii) Limit the state board’s or regional board’s authority over any person.

(iii) Limit any other applicable defenses to liability or create a cause of action.

(c) (1) If the waste is cleaned up or the effects of the waste are abated, or, in the case of threatened pollution or nuisance, other necessary remedial action is taken by a governmental agency, the person or persons who discharged the waste, discharges the waste, or threatened to cause or permit the discharge of the waste within the meaning of subdivision (a), are liable to that governmental agency to the extent of the reasonable costs actually incurred in cleaning up the waste, abating the effects of the waste, supervising cleanup or abatement activities, or taking other remedial action. The amount of the costs is recoverable in a civil action by, and paid to, the governmental agency and the state board to the extent of the latter’s contribution to the cleanup costs from the State Water Pollution Cleanup and Abatement Account or other available funds.

(2) The amount of the costs constitutes a lien on the affected property upon service of a copy of the notice of lien on the owner and upon the recordation of a notice of lien, that identifies the property on which the condition was abated, the amount of the lien, and the owner of record of the property, in the office of the county recorder of the county in which the property is located. Upon recordation, the lien has the same force, effect, and priority as a judgment lien, except that it attaches only to the property posted and described in the notice of lien, and shall continue for 10 years from the time of the recording of the notice, unless sooner released or otherwise discharged. No later than 45 days after

receiving a notice of lien, the owner may petition the court for an order releasing the property from the lien or reducing the amount of the lien. In this court action, the governmental agency that incurred the cleanup costs shall establish that the costs were reasonable and necessary. The lien may be foreclosed by an action brought by the state board on behalf of the regional board for a money judgment. Moneys recovered by a judgment in favor of the state board shall be deposited in the State Water Pollution Cleanup and Abatement Account.

(d) If, despite reasonable efforts by the regional board to identify the person responsible for the discharge of waste or the condition of pollution or nuisance, the person is not identified at the time cleanup, abatement, or remedial work is required to be performed, the regional board is not required to issue an order under this section.

(e) “Threaten,” for purposes of this section, means a condition creating a substantial probability of harm, when the probability and potential extent of harm make it reasonably necessary to take immediate action to prevent, reduce, or mitigate damages to persons, property, or natural resources.

(f) Replacement water provided pursuant to subdivision (a) shall meet all applicable federal, state, and local drinking water standards, and shall have comparable quality to that pumped by the public water system or private well owner before the discharge of waste.

(g) (1) A public water supplier or private well owner receiving replacement water by reason of an order issued pursuant to subdivision (a), or a person or entity who is ordered to provide replacement water pursuant to subdivision (a), may request nonbinding mediation of all replacement water claims.

(2) If requested, the public water suppliers receiving the replacement water and the persons or entities ordered to provide the replacement water, within 30 days of the submittal of a water replacement plan, shall engage in at least one confidential settlement discussion before a mutually acceptable mediator.

(3) Any agreement between parties regarding replacement water claims resulting from participation in the nonbinding mediation process shall be consistent with the requirements of any cleanup and abatement order.

(4) A regional board or the state board is not required to participate in any nonbinding mediation requested pursuant to paragraph (1).

(5) The party or parties requesting the mediation shall pay for the costs of the mediation.

(h) As part of a cleanup and abatement order that requires the provision of replacement water, a regional board or the state board shall request a water replacement plan from the discharger in cases where replacement water is to be provided for more than 30 days. The water replacement plan is subject to the approval of the regional board or the state board before its implementation.

(i) A “water replacement plan” means a plan pursuant to which the discharger will provide replacement water in accordance with a cleanup and abatement order.

(j) This section does not impose any new liability for acts occurring before January 1, 1981, if the acts were not in violation of existing laws or regulations at the time they occurred.

(k) Nothing in this section limits the authority of a state agency under any other law or regulation to enforce or administer any cleanup or abatement activity.

(l) The Legislature declares that the amendments made to subdivision (a) by Chapter 614 of the Statutes of 2003 do not constitute a change in, but are declaratory of, existing law.

(m) Paragraph (5) of subdivision (b) shall apply to a claim presented pursuant to Part 3 (commencing with Section 900) of Division 3.6 of Title 1 of the Government Code on or after January 1, 2015, or, if no claim is presented pursuant to those provisions, to a cause of action in a civil complaint or writ petition filed on or after January 1, 2015.

Approved _____, 2014

Governor